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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91169216
Party	Defendant Brand X-treme, Inc. Brand X-treme, Inc. N 1197 Tombeau Road Genoa City, WI 53128
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Submission	Other Motions/Papers
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Signature	/Thaddeus C. Stankowski/
Date	05/05/2006
Attachments	Motion.pdf (5 pages)(19231 bytes) Affidavit.pdf (2 pages)(60610 bytes) Answer.pdf (3 pages)(10778 bytes)

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

THE GATES CORPORATION,	)	
	)	
Opposer,	)	Opposition Number: 91169216
	)	
v.	)	Serial Number: 78/278,455
	)	BRAND X-TREME PRODUCTS
BRAND X-TREME, INC.	)	(Stylized)
	)	
Applicant.	)	

MOTION FOR ACCEPTANCE OF LATE FILED ANSWER

To: Assistant Commissioner for Trademarks
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451

Applicant, Brand X-Treme, Inc., by and through its attorneys, von Briesen & Roper, s.c. respectively request that the Trademark Trial and Appeal Board ("TTAB") accept Applicant's late filed Answer and that the TTAB not enter default judgment against Applicant. Applicant basis its request on the following factors:

1. Applicant's delay in filing its answer was not the result of willful conduct or gross negligence.

2. Opposer will not be substantially prejudice by the delay.

3. Applicant has a meritorious defense to the Opposition.

PROCEDURAL BACKGROUND

1. Applicant filed an intent to use application for the mark "BRAND X-TREME PRODUCTS" in July of 2003.

2. The mark was published in the official gazette at TM185 on September 27, 2005.

3. Opposer applied for extension to file an opposition on October 26, 2005 extending its deadline to file an opposition until November 27, 2005.

4. On November 23, 2005, Opposer filed its Opposition to Applicant's mark.

5. The TTAB's official Notice of Opposition was mailed on February 16, 2006, providing for an answer due date of March 28, 2006.

6. Applicant filed an answer and motion for acceptance of late filed answer on May 5, 2006.

ARGUMENT

When addressing issues of potential default judgment, the TTAB applies the standards of Rule 55 of the Federal Rules of Civil Procedure. Although Rule 55 deals with default judgment and is addressed within this motion, it should be noted that neither a notice of default has been issued, nor has default judgment been entered. However, even if default had been entered, the following facts support good cause to set aside an entry of default judgment. Based on the following facts that Applicant respectively requests the acceptance of its late filed answer.

A. Failure to respond was not the result of willful conduct or gross negligence on the part of Applicant.

It has always been Applicant's intention to challenge the above captioned Opposition. (*See* Affidavit of David B. Sarna,¶2) Shortly prior to receiving the Notice of Opposition in late February of 2006, Mr. Sarna, who was President of Brand X-Treme, Inc., experienced a family emergency. During the time period between the first week in February through the first week in April, Mr. Sarna missed a substantial amount of time at work to attend to the family emergency. (*See* Affidavit of David B. Sarna, ¶s 3 and 4.) During this time period, Mr. Sarna believed that Craig Ransavage, Secretary/Treasurer of Brand X-Treme, Inc., was coordinating a response to

the Opposition. Unfortunately, Mr. Sarna was mistaken and no response had been filed to the Opposition. (*See* Affidavit of David B. Sarna, ¶s 5 and 6.)

In April of 2006, Applicant was given notice of a second opposition for its word mark "BRAND X-TREME PRODUCTS." (*See* Affidavit of David B. Sarna, ¶7.) It was only during the process of preparing the response to second opposition did Mr. Sarna learned that no response had been filed to this opposition directed at Applicant's logo. (*See* Affidavit of David B. Sarna, ¶8.) Upon learning that no opposition had been filed, Mr. Sarna requested that an answer be filed, and efforts be taken to avoid default judgment. (*See* Affidavit of David B. Sarna, ¶9.)

B. <u>Opposer is not prejudiced by late filed answer</u>.

A delay of only a little more than a month occurred between the due date of Applicant's response and the late filing of its answer. Opposer initially delayed the opposition for a month by filing an extension of time to file the opposition, and waited nearly to the end of its period to file.

Opposer also opted to file an extension of time in the near parallel opposition to Applicant's word mark "BRAND X-TREME PRODUCTS." Applicant has filed a timely response to the second opposition, which will require the evaluation of many of the same issues raised in the this opposition.

Based on Applicant's short delay in filing a timely answer, Opposer's elected delay in filing an opposition, and active opposition based on Applicant's corresponding word mark, Opposer would not be prejudiced by allowing this opposition to go forward.

C. <u>Applicant has a meritorious defense to the Opposition</u>.

Opposer claims use of its mark "XTREME" in relationship to power transmission belts for land vehicles. A copy of Opposer's alleged use is attached hereto as **Exhibit A**. Applicant's logo:

is used on metal key chains, figurines of common metal, metal license place, suspension systems, and shock absorbers for land vehicles, in particularly, snowmobiles, as well as, t-shirts, jerseys, shirts, shorts, tank tops, boxer shorts, night shirts, sweat shirts, jackets, hats, coats, pajamas, pants, scarves, bandanas, belts, ponchos, and shoes.

It is Applicant's believe that based on Polaroid factors,[1] there is no likelihood of confusion as a result of concurrent use of the parties marks. In view of the lack of similarity between Opposer's mark and the varied goods upon which the marks are used, Applicant has at the very minimum a reasonable basis for its challenge to the Opposition.

CONCLUSION

Based on the foregoing, good cause exists for the acceptance of Applicant's late filed Answer. Applicant respectively requests that default judgment not be entered against it, and that it be allowed to proceed the above captioned Opposition.

[1] Polaroid Corp. v. Polarad Elec. Corp., 287 F 2nd 492, 495 2nd Circuit; cert. denied *368 U.S. 820 (1961).*

Submitted this 5th day of May, 2006.

/s/ Thaddeus C. Stankowski
Galo I. Vargas; Patent Bar No: 53717
Thaddeus C. Stankowski, Patent Bar No: 45522
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Opposer,	)	Opposition Number: 91169216
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	)	BRAND X-TREME PRODUCTS
BRAND X-TREME, INC.	)	(Stylized)
	)	
Applicant.	)	

AFFIDAVIT OF DAVID B. SARNA IN SUPPORT OF
MOTION FOR ACCEPTANCE OF LATE FILED ANSWER

STATE OF WISCONSIN)
) ss.
WALWORTH COUNTY)

I, DAVID B. SARNA, being first duly sworn on oath, deposes and states the following:

1. That your affiant is the President of Brand X-Treme, Inc. and makes this Affidavit in support of the Motion for Acceptance of Late Filed Answer.

2. That is has been your affiant's intention to challenge the above captioned Opposition.

3. That shortly after receiving the Notice of Opposition in February of 2006, your affiant experienced a family emergency.

4. That during the time period between the first week in February through the first week in April, your affiant missed a substantial amount of time at work to attend to the family emergency.

5. That during this period, your affiant believed that Craig Ransavage, Treasurer/Secretary of Brand X-Treme, Inc., was coordinating a response to the Opposition.

6. That your affiant was mistaken and no response had been filed to the Opposition.

7. That in April of 2006, your affiant was given notice of a second opposition for its word mark "BRAND X-TREME PRODUCTS."

8. That during the process of preparing the response to the second opposition, your affiant learned that no response had been filed to this opposition directed at its logo.

9. That upon learning that no opposition had been filed, your affiant requested that an answer be filed to this Opposition, and efforts be taken to avoid default judgment.

Dated this 5TH day of May, 2006.

David B. Sarna

David B. Sarna

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THE GATES CORPORATION,	)	
	)	
Opposer,	)	Opposition Number: 91169216
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	)	BRAND X-TREME PRODUCTS
BRAND X-TREME, INC.	)	(Stylized)
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Applicant.	)	

APPLICANT'S ANSWER TO NOTICE OF OPPOSITION

To: Assistant Commissioner for Trademarks
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451

Brand X-treme, Inc. ("Applicant"), by and through its attorneys, von Briesen & Roper, hereby answer the Opposition filed by The Gates Corporation ("Opposer"), as follows:

1. Applicant lacks information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph 1 of the Opposition, and therefore, said allegations, each and every one, are denied.

2. Applicant admits that Opposer applied for an received registration of its mark "XTREME" in international class 012 under registration number 2115330 dated November 25, 1997. Applicant lacks information sufficient to form a belief as to the truth or falsity of the remaining allegations contained in paragraph 2 of the Opposition, and therefore, said remaining allegations are denied.

3. Applicant lacks information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph 3 of the Opposition, and therefore, said allegations, each and every one, are denied.

4. Admit allegations contained in paragraph 4 of the Opposition.

5. Applicant lacks information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph 5 of the Opposition, and therefore, said allegations, each and every one, are denied.

6. Applicant lacks information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph 6 of the Opposition, and therefore, said allegations, each and every one, are denied.

7. Applicant lacks information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph 7 of the Opposition, and therefore, said allegations, each and every one, are denied.

AFFIRMATIVE DEFENSES

8. There is no likelihood of confusion, mistake or deception created by Applicant's use of its mark, because the appearance of Applicant's mark is substantially different than the appearance of Opposer's mark.

9. There is no likelihood of confusion, mistake or deception created by Applicant's use of its mark, because the sound of Applicant's mark is substantially different than the sound of Opposer's mark.

10. There is no likelihood of confusion, mistake or deception created by Applicant's use of its mark, because its products and the products of Opposer are sold to a specific educated market, and purchases are knowledgeable in the field and exercise a high degree of care in selecting a product.

11. Applicant is known for its independent reputation and good will, and customers will not mistakenly believe that Applicant is affiliated or associated with Opposer.

12. If Applicant is precluded from using its mark, it will suffer an irreparable injury in a form of loss of its investment and its products packaging, advertising and promotional material, and its reputation and good will associated with its name and will be required to spend significant time, effort and money to develop and promote a new mark.

13. Applicant has been using its mark to identify the source of its product over a substantial period of time in the market place. Over this time, Applicant has advertised, promoted and sold its product under its mark, thus creating recognition and good will for the product.

14. Opposer's claims might be barred by the equitable doctrine of laches, waiver and estoppel.

WHEREFORE, the Applicant prays that the Opposition be dismissed.

Submitted this 5th day of May, 2006.

/s/Thaddeus C. Stankowski

Galo I. Vargas; Patent Bar No: 53717
Thaddeus C. Stankowski, Patent Bar No: 45522
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